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Supreme Court, U.S.
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No. 01-1435

In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Clackamas Gastroenterology Associates, P.C. is a medical clinic formed as a professional corporation but which operates and has legal attributes of a partnership.

The question presented is whether a federal court should apply an economic realities test to determine if the Clinic's physician-shareholders are counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to The Americans With Disabilities Act (hereinafter "ADA") and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physician-shareholders are employees. The court below rejected the holdings of the Seventh, Eighth and Eleventh Circuits which used an economic realities test. Instead, it adopted the reasoning of the Second Circuit which rejected that test.

PARTIES TO THE PROCEEDINGS

Petitioner

Clackamas Gastroenterology Associates, P.C., an Oregon professional corporation. It has no parent corporation. No publicly held company owns ten percent or more of its stock.

Respondent

Deborah Ann Wells.

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OPINIONS BELOW

This action was initiated by the Respondent (hereinafter referred to as "Wells") in the United States District Court for the District of Oregon, and that Court entered summary judgment in favor of Petitioner (hereinafter referred to as the "Clinic"). The Findings and Recommendations of the District Court Magistrate were referred to the District Court Judge and are reprinted in J.A. 83; and the Order Granting Summary Judgment is reprinted in J.A. 93.

Wells appealed to the United States Court of Appeals for the Ninth Circuit, Case No. 00-35545, and that Court entered an Opinion on November 26, 2001. The Opinion is reprinted in J.A. 97. The citation for the Opinion is 271 F.3d 903 (9th Cir. 2001).

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the United States District Court for the District of Oregon. The Court entered summary judgment in favor of the Clinic. Wells timely appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit entered its order on November 26, 2001. No petition for rehearing was sought.

On February 15, 2002, Justice O'Connor extended the time for Petitioner to file a Petition for a Writ of Certiorari to and including March 26, 2002. The Petition for Writ of Certiorari was timely filed on March 26, 2002 under Supreme Court Rule 13(1). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §12101(b)(1) and (2).

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. §12111(2), (4), and (5)(A)
Definitions under the Americans with Disabilities Act.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer
(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. §12112(a) Discrimination under the Americans with Disabilities Act.

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12116 Regulations.

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this title in accordance with

subchapter II of chapter 5 of title 5, United States Code.

42 U.S.C. §12117(a) Enforcement.

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

STATEMENT OF THE CASE

Petitioner (hereinafter, the "Clinic") is a medical clinic organized in 1979 as an Oregon professional corporation. Since July 1994 and for all times relevant to this proceeding, it had four physician-shareholders who owned the professional corporation and who constituted the board of directors. J.A. 29, 35, and 75. They attended monthly board meetings and controlled the management and operations of the medical practice. J.A. 35. They shared profits from the professional corporation through an annual bonus. J.A. 35. Although it was organized as a professional corporation, the physician-shareholders regarded themselves as partners. J.A. 65 and 71. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations. OR. REV. STAT. §58.185 (2001).

The Respondent (hereinafter "Wells") was, until she voluntarily terminated in May 1997, employed as the Clinic's bookkeeper with responsibility for patient collections. J.A. 30, 35, and 76.

On April 24, 1997, Wells was offered a transfer to the patient coordinator/receptionist position, a less demanding job, because she was not able to satisfactorily perform her duties as bookkeeper. J.A. 36. Wells refused the transfer and, instead, took medical leave and applied for disability. J.A. 31, 32, 36, 69, 77, and 78.

Wells did not return to work or contact the Clinic, so she was determined to have voluntarily resigned in accordance with the Clinic's unexcused absence policy. J.A. 31, 37, and 77.

After she terminated, Wells brought an action against the Clinic under Title I of the ADA, 42 U.S.C. § 12101-12117, and other supplemental state claims.

The Clinic moved for summary judgment against Wells' ADA claims on the grounds that it was not an "employer" as defined by the Act and, consequently, not a "covered entity" within the meaning of the ADA because it did not have 15 or more employees for 20 weeks in the current or prior calendar years as required by the statute. The outcome hinged on whether the physician-shareholders were counted as employees. If the physician-shareholders were not counted as employees, it is uncontested that the Clinic had 15 employees for 10 weeks in calendar year 1996 (the "previous calendar year") and eight weeks in 1997 (the "current calendar year"). J.A. 35. If, on the other hand, the physician-shareholders were counted, the Clinic would have had 15 or more employees for 20 or more weeks in 1996 and 1997.

The District Court granted summary judgment for the Clinic and dismissed Wells' complaint. J.A. 95. Wells appealed. A panel of the Ninth Circuit reversed the District Court's decision in a two to one ruling. J.A. 97.

The Clinic petitioned this Court for a Writ of Certiorari which was granted on October 1, 2002.

SUMMARY OF THE ARGUMENT

A. FEDERAL COURTS SHOULD EXAMINE ECONOMIC REALITIES.

Federal Courts should apply an economic realities test to determine if the shareholders in a professional corporation are counted as "employees" for the purpose of determining if the professional corporation is a "covered entity" subject to the ADA and other federal anti-discrimination statutes.

In Oregon, a professional corporation is similar, but not identical, to an ordinary incorporated business; it retains significant attributes of a professional partnership, as well. Oregon is not alone. Most states have enacted laws which preserve aspects of professional partnerships in professional corporations.

The four shareholders in the Clinic involved in this case regarded themselves more as partners in a partnership than as shareholders in a corporation. All four participated in the management and operation of the Clinic's medical practice, attended monthly management meetings and shared in profits from the practice through an annual bonus system. The economic reality is that the four physician-shareholders in the Clinic are more analogous to partners in a partnership than to shareholders in an ordinary corporation.

It is undisputed that if the Clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." The ADA only applies to an "employer," defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each

working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. §12111(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. §12111(4).

Courts should apply an economic realities test to determine whether physician-shareholders, such as the four physicians in the Clinic, are, in reality, partners, and not "employees," under the ADA. Such an examination of the economic realities of a business entity yields a result that is evenhanded, consistent and flexible.

Fairness demands that courts look past the business form and examine the true relationship between the individual and the enterprise. It makes no sense to treat virtually identical small businesses differently because they have adopted different forms of organization. The reason for limiting the ADA's coverage to entities with 15 or more employees is to divide larger business from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws including the ADA"), Cert. Denied, 528 U.S. 1019 (1999).

The purpose of the ADA is, in part, to provide consistent standards. 42 U.S.C. §12101(b)(2). One such standard is how courts determine whether an individual is an "employee" as that term is used in the Act. The ADA has only one definition of "employee." The term "employee" is used both to determine whether an entity

is covered by the Act, 42 U.S.C. §12111(2) and (5)(A), and whether an individual has a right to sue under the Act, 42 U.S.C. §12112(a), and 42 U.S.C. §12117(a). The Act's admonition to provide consistent standards strongly suggests that the test used to determine whether an individual has a right to sue should be the same test used to determine whether a business is a covered entity.

Traditional business forms are being modified by new business forms such as Limited Liability Partnerships (LLPs) and Limited Liability Corporations (LLCs). Individual participants in these new LLCs may be labeled "members" or "managers" (OR. REV. STAT. §63.130 (2001)), and their employment relationships and roles may vary. As American business changes, reliance solely on business form to determine who is an employee becomes less dependable. Application of an economic realities test yields a more flexible and ultimately more consistent result.

B. A BUSINESS ENTITY'S USE OF THE CORPORATE FORM SHOULD NOT PRECLUDE A COURT FROM INVESTIGATING REALITIES.

Business owners, workers, practitioners and the public are all better served when courts are able to look past labels to investigate economic realities. This Court applied such an economic realities test under similar (although not identical) circumstances in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees under the FLSA); and *Nationwide Mutual Insurance Company, et al. v. Darden*, 503 U.S. 318 (1992)(agency law principles applied to determine whether an

insurance agent was an independent contractor or employee under ERISA).

A rigid rule that demands allegiance to form over substance may be easier to apply, but such a rule does not necessarily yield a result that is equitable. There is no valid reason to adopt a rule, whether or not easy to apply, that prevents a court from using a test that seeks to determine the true relationship between a business entity and an individual.

ARGUMENT

A. FEDERAL COURTS SHOULD EXAMINE ECONOMIC REALITIES.

Federal Courts should apply an economic realities test to determine if the shareholders in a professional corporation are counted as "employees" for the purpose of determining if the professional corporation is a "covered entity" subject to the ADA and other federal anti-discrimination statutes. Courts often scrutinize the facts of a particular case to determine the essence of the substance behind the form.

1. The Nature of Professional Corporations.

A professional corporation is similar, but not identical, to an ordinary incorporated business; it retains significant attributes of a professional partnership.

(a) The Origin of Professional Corporations.

Professional corporations originated in the group practice of medicine as it developed after World War II. During this time, professionals struggled to find an entity similar to an ordinary corporation in which to secure retirement and other tax related benefits for both themselves and their employees. Prior to the 1960s, both ethical and legal restraints imposed by state laws prohibited professionals from practicing through corporations. HARRY V. LAMON, JR. AND J. ALSTON THOMPSON, JR., THE COMPLETE PROFESSIONAL CORPORATION DESK BOOK (1982).

During the 1960s, states began enacting statutes

to allow professionals to form professional associations, which enabled them to adopt corporate-type retirement plans. Id. at ix. These statutes were, at least in part, in response to the refusal of the Internal Revenue Service to recognize that an association of professionals could adopt a pension plan. *See, e.g. U.S. v. Kintner*, 216 F.2d 418 (9th Cir. 1954).

By 1970 the IRS conceded that professionals may form associations which enable them to adopt corporate-type retirement plans and enjoy other tax-driven benefits such as health and medical plans and life insurance plans similar to ordinary corporations. *See* IRS Technical Information Release - 1019, August 8, 1969. Currently, those issues which triggered the genesis of professional corporations have largely disappeared, and business entities may now select tax treatment by merely checking a box on IRS Form 8832 (12-96) Entity Classification Election. Treas. Reg. §301.7701-3(c)(1)(i).

(b) Professional Corporations Retain Important Legal Aspects of a Partnership.

Notwithstanding historic efforts of professionals to obtain benefits similar to ordinary corporations, professional corporations retain significant attributes of a professional partnership.

In Oregon, a physicians' professional corporation resembles a professional partnership in several respects. The physicians' professional corporation preserves the professional relationship between the physicians and their patients, as well as the standards of conduct of the medical profession. OR. REV. STAT. §58.185(2) (2001). Oregon law provides that, "a shareholder of the

corporation is personally liable as if the shareholder were rendering the service or services as an individual" with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services OR. REV. STAT. §58.185(3) (2001). A licensed professional is jointly and severely liable for such claims, (within certain dollar limitations). OR. REV. STAT. §58.185(4)-(9) (2001). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. OR. REV. STAT. §58.185(11) (2001). A professional corporation's activities must remain consistent with the requirements of the type of license in question, OR. REV. STAT. §58.205 (2001). A professional corporation may merge only with other professional corporations in the same profession, OR. REV. STAT. §58.196 (2001). The provision of professional services - with its attendant liabilities - must remain at the heart of a professional corporation like the Clinic in this case.

Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority of shares, and all officers except the secretary and treasurer must be Oregon licensed physicians. OR. REV. STAT. §58.375(1)(a)-(c) (2001). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares and director positions to be held by Oregon licensed physicians. OR. REV. STAT. §58.375(1)(d) and (e) (2001). When a professional corporation is organized for the purpose of practicing medicine, the Board of Medical Examiners also may restrict the corporate powers beyond restrictions imposed on ordinary business corporations. OR. REV. STAT. §58.379 (2001). Finally, OR. REV. STAT. §58.375-58.389 (2001) contain impediments to the

transfer of shares and other corporate activities.[1]

Oregon is not alone. Most states have enacted laws which preserve aspects of professional partnerships in professional corporations.[2]

2. Physician-Shareholders are Analogous to Partners in a Professional Partnership.

It is not uncommon for shareholders in a professional corporation to think of themselves as partners in a partnership. The four shareholders in the Clinic involved in this case regarded themselves more as partners in a partnership than as shareholders in a corporation. J.A. 65 and 71. All four participated in the management and operation of the Clinic's medical practice, attending monthly management meetings and shared in profits from the practice through an annual

[1] Other professions in Oregon also have restrictions on non-licensed individuals owning an interest in a practice. Lawyers are not allowed to have non-lawyer partners. OREGON CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103 (2001). The Oregon Board of Accountancy imposes limitations on non-certified public accountants and non-public accountants from owning an interest in accounting firms. OR. ADMIN. R. 801-010-0340 (2002). Furthermore, only licensed dentists can own an interest in a dental practice. OR. REV. STAT. § 679.020(2) (2001).

[2] Among other states, there are statutes similar to those of Oregon regarding personal liability for negligence in rendering professional services in New York (N.Y. BUS. CORP. LAW § 1505(a) (1986)); Florida (FLA. STAT. ch. 621.07 (2001)); Illinois (ILL. REV. STAT. ch. 805 § 10/8 (1993)); Michigan (MICH. COMP. LAWS § 450.226 (2002)); New Jersey (N.J. REV. STAT. § 14A:17-8 (2002)); and Georgia (GA. CODE ANN. § 14-7-7 (2002)). Furthermore, like Oregon, these states also require directors, officers and/or shareholders to be licensed professionals. See N.Y. BUS. CORP. LAW §§1507, 1508 (1986); FLA. STAT. ch. 621.09, 621.10 (2001); ILL REV. STAT. ch. 805 § 10/3.4 (1993); MICH. COMP. LAWS § 450.224 (2002); N.J. REV. STAT. § 14A:17-10 (2002); and GA. CODE ANN. §§ 14-7-4(c), 14-7-5 (2002).

bonus system. J.A. 31, 35, and 75.

An individual cannot be both an employer and employee. It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the anti-discrimination statues. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984). It is also generally accepted that ordinary corporate employees are "employees" for purposes of the anti-discrimination statutes. *See, e.g., Archer v. Globe Motorists Supply Co., Inc., et al.*, 833 F.Supp. 211, 213 (S.D.N.Y. 1993). The economic reality is that the four physician-shareholders in the Clinic are more analogous to partners in a partnership than to shareholders in an ordinary corporation.

3. Justice Favors Acknowledging Economic Realities.

Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability. 42 U.S.C. §12112(a). The term "covered entity" includes an "employer." *Id.* §12111(2). An "employer" is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* §12111(5)(A). An "employee" is defined as "an individual employed by an employer." *Id.* §12111(4).

It is undisputed that if the Clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then the number of employees would have exceeded the number required to bring the Clinic under the coverage of the

ADA.

Courts should apply an economic realities test to determine whether physician-shareholders, such as the four physicians in the Clinic, are, in reality, partners, and not "employees," under the ADA. Such an examination of the economic realities of a business entity yields a result that is even-handed, consistent and flexible.

(a) Courts Should Apply a Test That is Evenhanded.

It makes no sense to treat virtually identical small businesses differently because they have adopted different forms of organization. The reason for limiting the ADA's coverage to entities with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, 42 U.S.C. §12111(5)(A), is to divide larger business from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws including the ADA"), Cert. Denied, 528 U.S. 1019 (1999); *See also, Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)(recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").

The result of the Ninth Circuit Opinion is demonstrated by comparing two clinics. Clinic "A," P.C. (like the Clinic in this case) is a "covered entity" for

ADA purposes. Next door, Clinic "B," which is identical in all respects, is not a "covered entity" because its four physicians decided not to adopt the P.C. format. Since the purpose of the 15-employee threshold is economic, it makes no sense to treat Clinics "A" and "B" differently. Application of an economic realities test yields a more evenhanded result.

(b) Courts Should Apply a Test That Is Consistent.

The purpose of the ADA is, in part, to provide consistent standards. 42 U.S.C. §12101(b)(2). One such standard is how courts determine whether an individual is an "employee" as that term is used in the Act. The ADA has only one definition of "employee." That definition is as follows: "The term "employee" means an individual employed by an employer." 42 U.S.C. §12111(4). The term "employee" is used both to determine whether an entity is covered by the Act, 42 U.S.C. §12111(2) and (5)(A), and whether an individual has a right to sue under the Act, 42 U.S.C. §12112(a), and 42 U.S.C. §12117(a).

The Act's admonition to provide consistent standards strongly suggests that the test used to determine whether an individual has a right to sue should be the same test used to determine whether a business is a covered entity.

When the question is whether an individual has a right to sue, courts have generally held that the form of organization does not control whether an individual is an employee, and courts have generally examined the economic reality of the circumstances. Although no Circuit has interpreted the ADA's definition of "employee," there are several cases that interpret nearly

identical language in other federal employment discrimination statutes including Title VII of The Civil Rights Act of 1964 and The Age Discrimination in Employment Act. These same cases also state that their interpretations should apply to all employment discrimination statutes. *See, e.g. Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997) ("we regard Title VII ADEA, ERISA and FLSA as standing in pari passu and endorse the practice of treating judicial precedence interpreting one such statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 796 (2nd Cir. 1986) (holding that for the FLSA, Title VII and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

In *EEOC v. Peat, Marwick, Mitchell and Company*, 775 F.2d 928 (8th Cir. 1985), the EEOC was allowed to investigate by subpoena whether some of the 1,300 partners were in fact employees. In *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996), the Ninth Circuit applied an economic realities test to determine if a claimant had a right to sue. It held that a court must

> "[A]nalyze the true relationship among partners, including the method of compensation, the "partners" responsibilities for partnership liabilities, and the management's structure and the "partners" role in management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws."

Id. at 867.

In *Strother*, the medical partnership in which the plaintiff was a partner had 2,400 to 2,500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. The Ninth Circuit remanded to the District Court finding that the plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." *Id.* at 868.

Whether an entity is covered by the Act and whether an individual has a right to sue under the Act are really two sides of the same coin. To be consistent, courts should examine both sides of the coin using the same test.

Examination of economic realities is not only a test for courts to use, it also plays a part in the investigation of anti-discrimination cases. The EEOC is the federal agency charged with promulgating regulations to carry out the purposes of the ADA. 42 U.S.C. §12116. In its "EEOC Compliance Manual Directives Transmittal No. 915.003(2000)(http://www.eeoc.gov/docs/threshold.html #2-III-A-1-d), the EEOC outlines what amounts to an economic realities test for its investigators to use to determine whether a partner in a partnership should be considered an employee.

There is no reason to treat business entities differently based solely on whether the claimant has an ownership interest in the entity. Indeed, such an approach would run contrary to the purpose of the ADA to provide consistent standards. 42 U.S.C. §12101(b)(2).

An economic realities test should be used to determine not only whether partners, in reality, should be considered employees under the ADA, but also to determine whether shareholders of a professional corporation should be, in reality, considered partners. Federal Courts should apply an economic realities test to determine if a person is an employee under the ADA, whether the issue is coverage (to determine if a shareholder in a professional corporation is an employee under the anti-discrimination laws) or the issue is right to sue (to determine if a partner is an employee under the anti-discrimination laws). There is no reason to disapprove the former and approve the latter. To be consistent, courts should apply an economic realities test whether the issue is coverage or right to sue. An economic realities test results in a more consistent result.

(c) Courts Should Apply a Test That is Flexible.

The advantages that originally lured professionals into forming professional corporations have eroded over time with the easing of eligibility requirements for retirement plans and other tax-driven workplace benefits. Traditional business forms are being superseded by new business forms such as Limited Liability Partnerships (LLPs) and Limited Liability Corporations (LLCs). Individual participants in these new LLCs may be labeled "members" or "managers" (OR. REV. STAT. §63.130 (2001)) and their employment relationships and roles may vary. As American business changes, reliance solely on business form to determine who is an employee becomes less dependable.

The question of who is an employee should be examined on the basis of economic realities. Fairness

demands that courts look past the business form and examine the true relationship between the individual and the enterprise. Application of an economic realities test yields a more flexible result.

B. A BUSINESS ENTITY'S USE OF THE CORPORATE FORM SHOULD NOT PRECLUDE A COURT FROM INVESTIGATING REALITIES.

Business owners, workers, practitioners and the public are all better served when courts are able to look past labels to investigate economic realities. This court adopted such an economic realities test in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees under the FLSA). This court also embraced examination of realities when asked to construe the meaning of "employee" as used in ERISA in *Nationwide Mutual Insurance Company, et al. v. Darden*, 503 U.S. 318 (1992) (agency law principles applied to determine whether an insurance agent was an employee under ERISA). While neither *Goldberg* nor *Darden* quite fit the mold of the question presented in this case, they do illustrate the wisdom of favoring substance over form.

Form is exalted over substance when courts rely strictly on a label to determine the true relationship between a business entity (e.g., a "partnership" or "professional corporation") and an individual (e.g., a "partner" or "employee"). In *Fountain v. Metcalf, Zima & Company, P.A.*, 925 F.2d 1398 (11th Cir. 1991) the U.S. Court of Appeals for the Eleventh Circuit observed that the evidentiary value of a label is extremely limited. *Id.* at 1401. Cases which extol the virtue of label reliance are scarce, and with good reason. In *Hishon v. King &*

Spalding, 467 U.S. 69, 79 (1984) this Court, in a concurrence by Justice Powell, stated that "of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'. . ." The Court of Appeals for the Eighth Circuit observed in *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996), that employment relationships vary greatly and often defy easy categorization. *Id.* at 81. A rigid rule that demands allegiance to form over substance may be easier to apply, but such a rule does not necessarily yield a result that is even-handed, consistent, and flexible. There is no valid reason to adopt a rule, whether or not easy to apply, that prevents a court from using a test that seeks to determine the true relationship between a business entity and an individual.

The economic realities test is a test that determines the true relationship between a business entity and an individual. It should be applied here, and the Clinic's physician-shareholders should not be counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to the ADA.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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